181 (2)

No. 10-800

Supreme Court, U S
FILED
JAN 2 7 2011
OFFICE OF THE CLERK

# In the Supreme Court of the United States

GREGORY WILSON,

*Petitioner*,

v.

LADONNA H. THOMPSON, IN HER OFFICIAL CAPACITY AS COMMISSIONER, KENTUCKY DEPARTMENT OF CORRECTIONS, ET AL.,

*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MICHAEL J. O'HARA
O'HARA, RUBERG, TAYLOR, SLOAN & SARGENT
25 Crestview Hills Mall Rd.
Covington, KY 41017
ACLU of Kentucky
Cooperating Attorney

WILLIAM E. SHARP
*Counsel of Record*
ACLU OF KENTUCKY
315 Guthrie Street
Suite 300
Louisville, KY 40202
(502) 581-9746
sharp@aclu-ky.org

DANIEL T. GOYETTE
LOUISVILLE METRO PUBLIC DEFENDER'S OFFICE
719 W. Jefferson Street
200 Advocacy Plaza
Louisville, KY 40202

*Counsel for Petitioner*

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

INTRODUCTION ..... 1

ARGUMENT ..... 2

I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THE COURT. ..... 2

II. *HILL V. MCDONOUGH* DOES NOT ANSWER THE QUESTION PRESENTED HERE. ..... 4

CONCLUSION ..... 5

## TABLE OF AUTHORITIES

### Cases

*Boumediene v. Bush*,
553 U.S. 723 (2008) . . . . . 4

*Bowling v. Kentucky Dept. of Corrections*,
301 S.W.3d 478 (Ky. Nov. 25, 2009), as corrected
(Jan. 4, 2010) . . . . . 1

*Cooey v. Strickland*,
479 F.3d 412 (6th Cir. 2007) . . . . . 2, 3

*Cooper Industries, Inc. v. Aviall Services, Inc.*,
543 U.S. 157 (2004) . . . . . 5

*Hill v. McDonough*,
547 U.S. 573 (2006) . . . . . 4

*United States v. Vonn*,
535 U.S. 55 (2002) . . . . . 3

*United States v. Williams*,
504 U.S. 36 (1992) . . . . . 4

*Webster v. Fall*,
266 U.S. 507 (1925) . . . . . 5

### Statutes, Rules and Regulations

42 U.S.C. § 1983 . . . . . 1

Kentucky Rule of Professional Conduct 3.130-3.3 . 2

## INTRODUCTION

In this 42 U.S.C. § 1983 action challenging Kentucky's method of execution, the Sixth Circuit Court of Appeals foreclosed consideration of Petitioner's claims as time-barred even though the claims were brought while the conviction and sentence were under review in federal post-conviction proceedings, and even though the challenged protocol had been declared void *ab initio* by the Kentucky courts.

In opposing certiorari, Respondents contend that: 1) the issues advanced are not squarely presented because they were neither raised nor litigated below [Respondents' Brief in Opposition (Respondents' Br.) at 6-8]; 2) the Sixth Circuit's claim accrual analysis for method of execution claims is consistent with this Court's precedents and with those from other circuits [*id.* at 8-13]; and 3) the claim accrual analysis employed here is unaffected by the Kentucky Supreme Court's decision in *Bowling v. Kentucky Dept. of Corrections*, 301 S.W.3d 478 (Ky. Nov. 25, 2009), as corrected (Jan. 4, 2010). [*Id.* at 13.]

Respondents' arguments are misplaced and serve to highlight the reasons why certiorari is appropriate to resolve important questions of claim accrual in method of execution cases.

## ARGUMENT

### I. THE ISSUES PRESENTED ARE PROPERLY BEFORE THE COURT.

Respondents' primary argument — that the issues presented were neither raised nor litigated below [Respondents' Br. at 6-8] — relies, in part, upon the unremarkable proposition that Wilson acknowledged to the district court the existence (and precedential value) of the Sixth Circuit's decision in *Cooey v. Strickland* (*Cooey II*), 479 F.3d 412 (6th Cir. 2007). [Respondents' Br. at 4.] But Respondents' characterization of Wilson's position below is, at best, incomplete. Specifically, Respondents state that Wilson acknowledged in the district court that *Cooey II* set forth the Sixth Circuit's claim accrual framework for method of execution claims [*id.* at 6] and "expressly accepted its controlling precedential value." [*Id.* at 8.]

Counsel for Wilson, of course, acknowledged *Cooey II* in the district court and noted its precedential value. To do otherwise would have constituted a breach of his ethical duties. *See* Kentucky Rule of Professional Conduct (KRPC) 3.130-3.3. However, Wilson did not accept *Cooey II*'s holding as "controlling" in this case. Rather, Wilson sought to distinguish *Cooey II* and specifically argued why the case was inapposite. This fact is evident when that portion of Wilson's district court brief cited by Respondents is quoted more fully:

> Although *Cooey* does provide the basic analytical framework for determining the accrual date for method of execution claims, it does not answer the question of when such claims accrue when the default accrual date —

> at the conclusion of direct review — pre-dates the state's adoption of the challenged method of execution. *See Cooey*, 479 F.3d at 422 (applying, without deciding, Ohio's adoption of lethal injection as the "exclusive method of execution" in 2001 as the relevant claim accrual date rather than Ohio's adoption of lethal injection as a mere secondary form of execution in 1993).

[R.28: Plaintiff's Response Memorandum Opposing Defendants' Motion to Dismiss at 2.] Thus, while it is correct that Wilson did not argue to the district court that *Cooey II* was wrongly decided and seek its reversal (a remedy, of course, the district court lacked authority to grant), there was no need to do so because, as Wilson argued, *Cooey II* did not control the outcome of the claim accrual analysis here.

The district court rejected Wilson's arguments, however, and grounded its dismissal of his claims upon *Cooey II*. [Petitioner's Appendix (Pet. App.) at 12a-20a.] Wilson then appealed to the Sixth Circuit where he argued, in part, that *Cooey II* was wrongly decided. [Pet. App. at 5a.] Contrary to Respondents' assertion, the Sixth Circuit panel refused to "entertain" Wilson's argument regarding *Cooey II* because it lacked authority to overrule the reported decision of a prior panel, *not* because Wilson failed to raise the issue in the district court. [*Id.*]

Under this posture, the issue of whether *Cooey II* is consistent with this Court's existing precedent is adequately preserved for review and, for the reasons stated in Wilson's petition, justify the exercise of this Court's certiorari jurisdiction. *See, e.g.*, *United States v. Vonn*, 535 U.S. 55, 59 n.1 (2002) (claim "preserved if

made by the current litigant in 'the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent'" (quoting *United States v. Williams*, 504 U.S. 36, 44-45 (1992)); *see also Boumediene v. Bush*, 553 U.S. 723, 772, (2008) (noting "exceptional" circumstances justify reaching merits of question left unaddressed by Court of Appeals).

## II. *HILL V. MCDONOUGH* DOES NOT ANSWER THE QUESTION PRESENTED HERE.

Respondents also argue that certiorari should be denied because the Sixth Circuit opinion is otherwise consistent with this Court's precedents. [Respondents' Br. at 9-11.] In doing so, Respondents rely upon *Hill v. McDonough*, 547 U.S. 573 (2006) by stating that "[n]othing in the *Hill v. McDonough* opinion suggests that method of execution challenges cannot proceed until the validity of the sentence is collaterally challenged through a petition for habeas corpus." [Respondents' Br. at 10.]

But Respondents' argument misses the mark because *Hill* did not consider the issue presented here. Rather, *Hill* addressed whether a death row inmate may challenge the particular method of execution under 42 U.S.C. § 1983, or whether such a challenge must be brought via a habeas corpus petition. *Hill*, 547 U.S. at 579-80. While Respondents are correct, in a formalistic sense, that *Hill* does not affirmatively support Wilson's contention regarding claim accrual analysis [Respondents' Br. at 10], they err in relying on the decision's silence on that point to support the opposing proposition. "'Questions which merely lurk

in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

## CONCLUSION

For the foregoing reasons, and those contained in the petition for writ of certiorari, Wilson respectfully requests that certiorari be granted.

Respectfully submitted,

MICHAEL J. O'HARA
O'HARA, RUBERG, TAYLOR, SLOAN & SARGENT
25 Crestview Hills Mall Rd.
Covington, KY 41017
ACLU of Kentucky
Cooperating Attorney

WILLIAM E. SHARP
*Counsel of Record*
ACLU OF KENTUCKY
315 Guthrie Street
Suite 300
Louisville, KY 40202
(502) 581-9746
sharp@aclu-ky.org

DANIEL T. GOYETTE
LOUISVILLE METRO PUBLIC DEFENDER'S OFFICE
719 W. Jefferson Street
200 Advocacy Plaza
Louisville, KY 40202

*Counsel for Petitioner*

JANUARY 27, 2011